IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-437

MYRON M. AMATO and
JACK L. ROCKEY,

Petitioners,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

PETITION FOR REHEARING

The petitioners respectfully move this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on January 24, 1972, and (2) granting the petition.* As grounds for this motion, petitioners state the following:

THE OPINION BELOW THAT THE MAGAZINES ARE OBSCENE CONFLICTS WITH RECENT INTERVENING DECISIONS OF THIS COURT AND OTHER APPELLATE COURTS.

After the petitioners filed their petition for writ of certiorari with this Court on September 27, 1971, several relevant obscenity decisions were rendered by this Court and a lower appellate court which directly conflict with the opinion sought to be reviewed. See *Burgin v. South Carolina,* — U.S. —, 92 S. Ct. 46, 30 L. Ed. 2d 39 (October 12, 1971); *Wiener v. California,* — U.S. —, 92 S. Ct. 534, 30 L. Ed. 2d 539 (December 14, 1971); *United States v. Treatman,* No. 71-1511 (6th Cir., Jan. 12, 1972). The intervening decisions of this Court are of controlling effect in petitioners' case. The magazines in *Burgin* and *Wiener* are practically identical to those involved in petitioners' convictions.[1] In addition, *Treatman* adds one more United States Court of Appeals to those courts holding materials such as those involved here not obscene. See *Spinar v. United States,* 440 F. 2d 1241 (8th Cir. 1971); *Pinkus v. Pitchess,* 429 F. 2d 416 (9th Cir.), *aff'd.* 400 U.S. 922 (1970); *Hunt v. Keriakos,* 428 F. 2d

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[1]For example, the South Carolina Supreme Court in *Burgin* described the magazines involved as follows:

> "'I find the Book "Mirage" is a book containing color photographs of completely nude and/or semi-nude females. The semi-nudes only being that of females wearing garter belts, hose or other transparent materials. That the nudes are posed in such positions with legs wide spread that the pubic hair and external part of the genital organs are clearly visible. They are posed in positions sitting, lying, forward, backwards, leaning backwards, standing on their heads, all positions so that the camera would be focused directly upon the genital organs and breasts of the nudes.
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> 'In the magazine "Togetherness" I find there are colored photographs of male and female nudes, or semi-nudes. The semi-nudes having only garter belts, hose, and in some instances the males having on trousers with the front portion of the trousers cut out

606 (1st Cir.), *cert. denied,* 400 U.S. 929 (1970). *See also, United States v. Groner,* No. 71-1091 (5th Cir. Jan. 11, 1972).

Petitioner Rockey sold the magazine HONEY BUN on October 17, 1969. A jury convicted him of the sale of obscene magazines and he was sentenced to pay a fine of $3,000 or in default of payment to serve six months imprisonment. Petitioner Amato sold the magazines TULIP REVIEW and HEADS UP on the same date. The same jury convicted him of two charges of the sale of obscene magazines and he was sentenced to pay a total fine of $5,000 or in default to serve nine months imprisonment.

The Wisconsin Supreme Court affirmed these convictions. *State v. Amato,* 49 Wis. 2d 638, 183 N.W. 2d 29 (1971). The Court rested its affirmance upon the following description of the magazines:

> "In the instant case much of the material concerns itself with the depiction of sexual activity." 49 Wis. 2d at 642, 183 N.W. 2d at 31.

Were this an accurate description of these magazines, the petitioners would not seek a rehearing of their petition for certiorari. The description is patently inaccurate;

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[1] cont'd.

> or removed therefrom. Also, in poses directed so that the camera could focus on the genital organs of the males and females in positions with the males and females emphasizing the pubic and rectal regions of the males and females.
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> 'The magazine "Fair Lady" also portrays similar color photographs of nude females in similar positions.
>
> 'In the magazine "Flesh Fantasy" is black and white, and color photographs of females with legs outstretched, completely nude, with females with clothes on undressing each piece of clothing in successive pictures, with the camera focused or ultimately focused completely upon the genital organs of the females.' " *State v. Burgin,* 178 S.E. 2d 325, 326 (S.C. 1970).

the magazines do not depict sexual activity, and to find otherwise is to ignore the autoptic evidence of the magazines themselves.

Petitioners assert that at least one guide in determining the obscenity of a magazine is to compare it with those which were the bases of convictions reversed by this Court in reliance on *Redrup v. New York,* 386 U.S. 767 (1967). These summary reversals have been consistently relied upon by lower courts in determining what materials are protected by the First Amendment.

This Court has given no indication that such reliance is misplaced. Lower courts recognize that any attempt to formulate a description of what constitutes obscenity will result in a formula that is ambiguous and cloudy. In each term this Court has examined increasingly explicit displays of nakedness and found them to be protected. In a sense the *Redrup* reversals have given a certainty to the definition of obscenity and have provided an ascertainable standard of guilt in circumstances where statutes fail to do so. The *Redrup* reversals have provided the only stable bench mark amid a blizzard of opinions.

Petitioners assert that these summary reversals permit the inference that material virtually identical to that which formed the basis for a reversal is similarly protected by the First Amendment.

The denial of certiorari in *Amato v. Wisconsin,* (No. 71-437, *cert. denied* Jan. 24, 1972) introduces a quantum jump in the uncertainties of obscenity litigation. Heretofore it has been supposed that, as unpleasant as the task may be, this Court will independently review materials upon which obscenity convictions are based and will summarily reverse those convictions based upon ma-

terials substantially identical to materials previously held to be protected. *Cf. United States v. Thirty-Seven (37) Photographs,* 402 U.S. 363, 380 (1971) (Black, J., dissenting).

The import of the *Redrup* reversals transcends the individual petitioners whose convictions were reversed. In the absence of the *Redrup* reversals, lower courts were required to employ a deductive logic; that is, they were required to deduce from this Court's language in *Roth v. United States,* 354 U.S. 476 (1957), and *Memoirs v. Massachusetts,* 383 U.S. 413 (1966), whether material was protected by the First Amendment. The *Redrup* reversals permit an inductive logic; they permit a direct comparison of questioned materials with materials which have been authoritatively determined to be protected.

The alternative is not appealing. Either this Court must continue to examine materials upon which obscenity convictions are based, or lower courts will be denied an effective standard against which to compare materials alleged to be obscene. Further, a bench mark to be effective in this area must be contemporary. Not only do community standards change, but the materials offered for sale change as well. In the instant case this Court is viewing materials which were sold some 28 months ago. If this Court does not speak to the merits of petitioners' case, it may be an equal period of time before the magazines are before this Court in a collateral attack upon the convictions. *See, e.g., Childs v. Oregon,* 401 U.S. 1006 (1971).

Petitioners respectfully assert that the independent review by this Court of materials found to be obscene and the summary reversals of those convictions which rested upon protected materials perform a vital function in the

area of First Amendment protections and that this policy should not be modified without a full argument addressed to these issues.

While petitioners recognize that the denial of certiorari cannot be interpreted as an affirmance of the Wisconsin Supreme Court, they are concerned that it signifies a major policy decision by the Court. This concern arises from an examination of the magazines upon which the Amato and Rockey convictions were based. A comparison of these magazines with those which recently formed the basis for *Redrup* reversals reveals no differences. Petitioners are loath to ascribe arbitrariness to the Court and are thus forced to the disquieting conclusion that decisions of constitutional dimension have been made without benefit of argument and briefs.

If the denial of certiorari in *Amato v. Wisconsin, supra,* reflects a decision by this Court to deny *vel non* review in obscenity cases, petitioners respectfully urge that this decision be re-examined and that they be given the opportunity to be heard. If, on the other hand, petitioners' concerns are groundless and the denial of certiorari has no greater significance than in other cases, then petitioners ask this Court to view the magazines and to compare them with the magazines which formed the bases for recent *Redrup* reversals by this Court.

ROCKEY

Petitioner Rockey was convicted of selling HONEY BUN. This is a full-size magazine in which are displayed color photographs of undressed and semi-dressed women. The models are posed so that the photographs illumine their genitals and pubic areas. In short, the magazine HONEY BUN is identical with the magazines

GIGI, MIRAGE, FAIR LADY and FLESH FANTASY. In *Bloss v. Dykema,* 398 U.S. 278 (1970), GIGI was held not obscene. In *Burgin v. South Carolina,* — U.S. —, 92 S. Ct. 46, 30 L. Ed. 2d 39 (1971), MIRAGE, FAIR LADY and FLESH FANTASY were held not obscene. Petitioner Rockey asserts that what this Court has found to be protected in Michigan and South Carolina is protected in Wisconsin.

AMATO

Petitioner Amato was convicted of selling HEADS UP and TULIP REVIEW. These magazines display color photographs of undressed men and women. Models of both sexes are posed such that the photographs direct the attention of the viewer to the genital regions. The models are neither engaged in acts of intercourse nor other acts of sexual gratification. The magazine HEADS UP also contains some purportedly humorous written materials. The sexual explicitness of these magazines is indistinguishable from that in THE BALLERS and TOGETHERNESS. In *Wiener v. California,* — U.S. —, 92 S. Ct. 534, 30 L. Ed. 2d 539 (1971), THE BALLERS was held not obscene. In *Burgin v. South Carolina, supra,* TOGETHERNESS was found not obscene.

Petitioners recognize that in the adjudication of criminal cases an uncertainty is inevitably present. This uncertainty is magnified in prosecutions involving obscenity prosecutions. While it may be uncertain whether state or national standards are mandated in determining obscenity, whether obscenity can be found without expert testimony, whether a balancing of the *Roth-Memoirs* factors is permissible, two matters had been assumed to be resolved. One was that GIGI, MIRAGE, FAIR LADY,

FLESH FANTASY, TOGETHERNESS and THE BALLERS were protected by the First Amendment, and the other was that the normal adjudicative process would find that substantially identical magazines were likewise protected. *Amato* casts doubt upon these assumptions.

CONCLUSION

For the foregoing reasons, as well as those contained in the petition for writ of certiorari, petitioners respectfully urge this Court to compare the magazines which form the bases of their convictions with those magazines which have been found by this Court to share the protection of the First Amendment. Upon this comparison, petitioners pray that this Court grant rehearing of the order of denial, vacate that order, grant the petition, and review the judgment and opinion below.

Respectfully submitted,

/s/ James M. Shellow

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February 13, 1972

CERTIFICATE OF COUNSEL

As counsel for the petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

/s/ James M. Shellow
Counsel for Petitioners